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No. 603.

IN THE

Supreme Court of the United States

OCTOBER TERM 1945.

FIRST IOWA HYDRO-ELECTRIC CO-OPERATIVE,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent,

STATE OF IOWA,
Intervenor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

PETITION FOR REHEARING BY STATE OF IOWA, INTERVENOR.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

PETITION FOR REHEARING.

The State of Iowa, Intervenor herein, respectfully petitions the Court for a rehearing of the issues and questions involved in this matter on the grounds hereinafter stated.

OPINION.

The opinion of this Court was written by Mr. Justice Burton and was filed April 29, 1946, and has not been reported.

GROUNDS FOR REHEARING.

The State of Iowa submits that a rehearing of this case should be ordered by the Court and that upon resubmission the issues should be reconsidered because of the following grounds and matters:

1. The opinion of this Court is founded upon erroneous assumptions of fact and law that the Cedar River is a navigable water of the United States.

2. The opinion of the Court wrongfully—(1) declares that the provisions of the Iowa law as contained in Chapter 363 of the Code of Iowa are not such State laws as are referred to in Section 9(b) of the Federal Power Act; (2) construes and defines the meaning of the Iowa laws when a construction thereof has not yet been made by the Courts of the State of Iowa, which construction by this Court under such circumstances violates all the precedents by this Court; and (3) ignores the mandate of Congress contained in Section 9(b) of the Federal Power Act which provides that each applicant for a license *shall submit to the Commission satisfactory evidence* that the applicant has complied with the requirements of the laws of the State not only with respect to bed and banks but also with respect to the appropriation, diversion, and use of water for power purposes, and with respect to the right to engage in the business of developing, transmitting, and distributing power.

3. The opinion of the Court states an untenable principle of law and erroneously construes the Federal Power Act in holding that the Federal Power Act authorizes and empowers the Commission to license and permit the destruction of an inland river of the State by a private corporation for a strictly private commercial purpose, and in holding that the sovereign State is helpless to do anything about it, regardless of the irreparable damage done to the State and its people by such a project.

4. The opinion errs in not affirming the decision of the Court of Appeals for the District of Columbia and the decision of the Federal Power Commission because the record of the proceedings before the Power Commission and as recited in the opinion of this Court shows clearly that the applicant has not complied with the provisions of the Federal Power Act nor the Rules and Regulations promulgated by the Federal Power Commission.

ARGUMENT.

Upon the original submission of this case the principal arguments were upon the construction of Section 9(b) of the Federal Power Act. A number of matters are emphasized in the opinion filed by this Court which were not particularly stressed upon the original submission and which therefore, because of the importance attached to them in the opinion, require further elaboration and consideration in order to attain a just and fair result.

The State of Iowa is interested in this proceeding not only because of the irreparable damage which will be done to the State of Iowa and its people if the project as proposed and as described in the opinion is constructed, but also because of the violence done to the sovereign States of these United States if the construction given the Federal Power Act by this Court in its opinion is to prevail. It is inconceivable that meaning can be read into the language of the Federal Power Act which will empower the Federal Power Commission, if it can be so persuaded by a private party, to license and authorize the destruction of beautiful and valuable rivers lying within the borders of a State by a private party for a private commercial purpose, and the State be rendered helpless to do anything about it or to prevent it.

We do not believe and can never be made to believe that the Cedar River is now or ever was navigable within the meaning of the commerce clause of the Federal Constitution. Whether the Cedar River be navigable or not navigable, there are reasons so impelling as to warrant and require a rehearing and finally a reversal of the decision of this Court.

We present the following arguments to sustain each of the grounds for rehearing above set out. Upon further argument on rehearing these matters will be greatly enlarged and further citations of authority presented.

I.

The Cedar River is Not a Navigable Water of the United States.

1. The opinion of the Court recites that on January 29, 1940, pursuant to Section 23(b) of the Federal Power Act, the First Iowa Hydro-Electric Co-operative, hereinafter referred to as the applicant, filed with the Commission a declaration of intention to construct and operate a dam and reservoir and hydro-electric plant on the Cedar River near Muscatine, Iowa. In this project there was to be no diversion of water. In the footnote on page 3 of the printed opinion of this Court, it is stated that on February 7, 1940, the Commission sent a notice to the Governor of Iowa of the filing of the original declaration of intention and invited him to present information and comments relative thereto, and that the State took no part in the proceedings. Note this was a run of the River project such as had been twice presented to the Executive Council of the State of Iowa, of which the Governor was a member, and authorization to construct the project twice denied by the Executive Council because the Executive Council found that that project was neither desirable nor adequate just as the Federal Power Commission found and as recited on page 9 of the printed opinion. Nearly

fourteen months thereafter and on April 2, 1911, and as stated at the top of page 2 of the printed opinion, the applicant filed with the Commission a supplemental declaration of intention to construct an enlarged project essentially like the one it now wishes to build which includes an almost complete diversion of the waters of the River through a canal to the Mississippi River, thus rendering the lower twenty-one miles of the Cedar River a dry run. We do not understand that there is any claim that there was ever any notice given to the Governor of Iowa of this changed project.

Thereafter and on June 3, 1911, the Commission made *ex parte* "findings" as set out on page 3 of the printed opinion. One was "That the Cedar River and Iowa River are navigable waters of the United States". It will be noted in the same findings "that the Commission found that the diversion of water from the Cedar River to the Mississippi River by means of the diversion canal would have a direct and substantial effect upon the Iowa River into which the Cedar River now flows; and also that if the project were constructed it would cause extreme fluctuation in the flow of the Mississippi River at Muscatine where the canal emptied and would substantially affect the navigable capacity of that River. Note that the Commission found that these fluctuations would be caused by the proposed project and that they would affect the navigability of the Mississippi River. The Commission does not find that the Cedar River as it now flows has any material effect upon the navigability of the Mississippi River. On the contrary the evidence upon the later hearing before the Commission indicated clearly that the water from the Cedar River in its natural flow through the Iowa River causes only a negligible effect upon the Mississippi River.

We call attention to this matter for the reason that this Court apparently establishes the jurisdiction of the Federal

Power Commission over this project and thus imposes the Federal Power Act upon the Cedar River by reason of this *ex parte* finding on the part of the Commission that the Cedar River is navigable.

It is fair to assume that when the original letter of February 7, 1940, was received by the Governor of Iowa advising of the filing of the original declaration of intention to build the original project which did not include the diversion of the water of the River, that the Governor did not deem that the proposal merited or required the wasting of any time in appearing in connection with it. The Executive Council of Iowa had twice denied the applicant a permit based upon that plan and the Governor knew that it was not a feasible or practicable plan, and had a right to assume that the Federal Power Commission would likewise so find as it did find in its decision of January 29, 1944, a part of which is set out on page 4 of the printed opinion of this Court. Therefore, on this record, the Governor of Iowa was not notified of the new project which included a major change, and in effect was a new and different declaration of intention to construct. The State of Iowa cannot be charged with negligence in failing to appear under these circumstances and especially since the finding of the Commission of June 3, 1941, included a finding that the new project would cause extreme fluctuations in the Mississippi River at Muscatine, the place of the outlet of the diversion canal.

In the briefs on the original submission both the applicant and Counsel for the Federal Power Commission assert that the "finding" of the Commission on June 3, 1941, is in effect an "order" and that the State having not appealed therefrom is now estopped to assert these matters. Such a position is not tenable. The declaration of intention to construct was filed under the provisions of Section 23(b) of the Federal Power Act. There is no provision in that Section

for any hearing or for the giving of notice. That Section merely provides that before any one desiring to construct a dam or other project in any stream, other than those defined as navigable and over which Congress has jurisdiction under its authority to regulate commerce among the several States, shall before such construction, file a declaration of intention with the Commission "whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, city or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and have received a license under the provisions of this Chapter". It provides that if the Commission shall not so find then permission is granted to construct the project upon compliance with the State laws.

In the case at bar the "finding" of June 3, 1941, was under the provisions of Section 23(b). There was no formal hearing. There was merely an investigation by the Commission. This was solely for the purpose of advising the applicant whether it would be required to file an application for a license under the provisions of Section 4(e) of the Act. To hold that this was an order and that the State is estopped because it did not appeal therefrom is a denial of due process of law. Subsequently on August 11, 1941, and after the June 3, 1941, "findings", the applicant did file its application under Section 4(e) of the Act. Notices presumably were sent out under the provisions of Section 4(f) of the Act, for the State and other parties did thereafter appear. The State questioned the navigability of the Cedar River before the Commission. Therefore, the State did not waive its right to challenge these findings.

Upon the hearing the State called the attention of the Federal Power Commission to the fact that Congress had

already determined that the outlet for the Cedar River through the Iowa River into the Mississippi River is a non-navigable stretch by Acts of Congress, and that therefore perforce the Cedar River could not be considered a navigable water of the United States under the commerce clause of the Federal Constitution.

Note in this connection that the Cedar River flows for about twenty-one miles below the site of the proposed diversion dam where it joins the Iowa River at the town of Columbus Junction, and that the Iowa River then flows for twenty-eight miles in the State of Iowa before it joins the Mississippi River at the eastern border of the State. At this point we desire to call the attention of the Court again as we did on page 40 of our brief on the original submission, to the point that Congress determined the fact and by enactments gave expression to the fact that the Iowa River from approximately its point of junction with the Mississippi River and for a distance of twenty miles from that junction and to a point above the town of Wapello located upon the Iowa River is not a navigable river or a public highway. We again set out those enactments for the information of the Court:

> "Acts of Congress of May 6, 1870. (Iowa River.) So much of the Iowa River within the State of Iowa, as lies north of the town of Wapello shall not be deemed a navigable river or public highway, but dams and bridges may be constructed across it." (Rev. Stat. 1878, Sec. 5278, U.S.C.A. Title 33, Sec. 31.)

> "Acts of Congress of Aug. 18, 1894. So much of the Iowa River within the State of Iowa as lies between the town of Toolsboro and the town of Wapello in the County of Louisa, shall not be deemed a navigable river or public highway, but dams and bridges may be constructed across it." (Chap. 299, 53rd Congress, 2nd Session, U.S.C.A. Title 33, Sec. 31.)

The Federal Power Commission therefore had no right nor power to make a finding of fact adverse and contrary to the finding of fact made by the creator of the Federal Power Commission and of the Federal Power Act, the Congress of the United States. If twenty miles of the Iowa River below the junction of the Cedar River with the Iowa River is non-navigable, (and it cannot be disputed that Congress has determined that fact), then how can there be any commerce from the Cedar River among the several States. The Cedar River lies wholly within the State of Iowa. If any parts of the river are navigable there can be commerce only between interior points within the State of Iowa and not among the States under the commerce clause of the Federal Constitution. This fundamental concept was first pronounced by the members of this Court early in the life of this Nation in the case of *Daniel Ball*, 10 Wall 557. There the Court stated:

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact, and they are navigable in fact when they are used, or are susceptible of being used in every ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water, and they constitute navigable water of the United States within the meaning of the Acts of Congress, in contra-distinction from the navigable waters of the States, when they form in every ordinary condition by themselves, *or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.*" (Emphasis ours.)

This situation is like unto one where there is an inland lake which is navigable but has no outlet and is wholly within a State. The Federal Government would not and could not under the commerce clause assume that such an inland lake is a navigable water of the United States. Neither is the situation in the Cedar River any different than the situation

above described as to the inland lake. The determination of the fact of non-navigability and the expression of it by the Acts of Congress is as effective as though that twenty mile stretch were a stretch of dry land. The Iowa River and the Cedar River both were thereby declared to be non-navigable. The situation is not like one where there are rapids or other similar obstructions in an otherwise navigable stream which could by reasonable cost and as a practicable proposition, be blasted out and a channel made through the rapids. No such a situation can exist in this case.

The administrative authorities of the United States having to do with the navigable waters of the United States have always considered that the Cedar River is not a navigable water of the United States. The Chief of Engineers of the United States Army, W. H. Bixby, in connection with an application made by the Federal Construction Company of Muscatine, for permission to build a dam across the Cedar River stated on August 26, 1911, as follows:

> "As the Cedar River terminates by a junction with the Iowa River well inside the State of Iowa and in the language of the Supreme Court does not by itself, or by uniting with other waters, form a continued highway over which commerce is or may be carried on with other States or foreign countries, it follows that the Cedar River is not a navigable water of the United States, as defined by the Supreme Court, but constitutes a navigable water of the State of Iowa."

The pronouncements in *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 85 L. Ed. 243, do not in any manner adversely affect the situation in the case at bar because neither the Power Commission or this Court has the right to say that the River is navigable contrary to the Acts of Congress, which declare that it is non-navigable.

Therefore, the State complains of the *ex parte* finding by the Federal Power Commission that the Cedar River is a

navigable water of the United States and submits that if this Court is founding its opinion upon that premise, that the premise is built upon the sands and cannot stand. We submit that inasmuch as the opinion of the Court calls attention in the opinion and in the footnotes to the fact that the State of Iowa did not appear in response to the letter of February 7, 1940, to its Governor, note should be taken of the fact that the Federal Power Commission had before it at the time it made its findings of June 3, 1911, a new and different application involving a materially different project. The Commission should have taken judicial notice just as the Chief Engineer of the Army did, that Congress had already by an Act of Congress declared the fact that the Cedar River is not a navigable water of the United States because it lies within the interior of the State of Iowa and there is no way to get out of the Cedar River into another State. A rehearing should be granted and this Court should consider these matters in determining whether or not the Federal Power Act is applicable at all to this project in view of the broad scope of the opinion.

See in this connection:

Veazie v. *Moore*, 14 How. (U.S.) 567, 14 L. Ed. 545;
Glenn v. *Philadelphia*, 3 Wall (U.S.) 721;
Moore v. *American Transportation Co.*, 24 How. (U. S.) 1, 39; 16 L. Ed. 674.
The Montello, 11 Wall (U.S.) 411, 415;
Gibbon v. *Ogden*, 9 Wheat 192, 6 L. Ed. 23.

II.

The Court's Opinion Rests on Erroneous Findings of Law.

This ground is divided into three subdivisions, namely, (1) that the Court erred in declaring that the provisions of the Iowa law as contained in Chapter 363 of the Code of Iowa, are not such state laws as are referred to in Section

9(b) of the Federal Power Act; (2) the opinion of the Court arbitrarily construes and defines the meaning of state laws before a construction thereof has been made by the Iowa Courts, which violates all precedents; and (3) the opinion ignores the mandate contained in Section 9(b) of the Federal Power Act which provides that the applicant *shall* submit satisfactory evidence of compliance with certain state laws.

1. The opinion of the Court erroneously states that the Iowa statutes in question are not such statutes as are referred to in Section 9(b) of the Federal Power Act. Section 9(b) provides as follows:

> "That each applicant for a license hereunder *shall* submit to the Commission—
>
> (b) *Satisfactory evidence* that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located *with respect* to bed and banks and *to the appropriation, diversion and use of water for power purposes* and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act." (Emphasis ours.)

Without repeating all of the Iowa law as contained in Chapter 363 of the Code of Iowa which is set out in Appendix A of the Brief of the Power Commission on original submission, we desire to call attention to the fact that said provisions of law are with respect to things other than the "property rights" of the petitioner and of other individuals. It is true that the Iowa law requires an application to the Executive Council and requires that certain information be furnished in order to apprise the Executive Council as to the nature of the proposed development so that the Executive Council can have information upon which to determine whether the proposed project is covered by the laws of the state with respect not only to bed and banks, but to the

appropriation, diversion and use of water for power purposes, and with respect to the right to engage in the business. The statute calls for information as to the nature of the project, where it is to be constructed, how, a map showing the lands to be affected, the ownership of the tracts and such additional information as the Council may require in order to determine under the police power of the state whether the project is a proper project, and whether it will be detrimental to the interests of the people of the state. Section 7771 of the Code of Iowa provides that—

> "If it shall appear to the Council that the construction, operation or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practical place without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit upon such terms and conditions as it may prescribe."

Obviously, these provisions enjoin upon the Council the duty to protect the interests of the state in regard to these matters. It is further provided that the Executive Council shall investigate the methods of construction, operation, maintenance and equipment of the dam so as to determine the best method to conserve and protect as far as possible all public and riparian rights in the waters of the state, and so as to protect the life, health and property of the general public. We cannot conceive of any language which would more nearly refer to the appropriation, diversion and use of water for power purposes than these provisions which have just been referred to. Surely, no one can contend that this language does not refer to the appropriation, diversion and use of water for power purposes. Obviously, these provisions of law are of the character referred to in Section 9(b) of the Act.

It will be noted that Section 9(b) does not say that the applicant may, or that the Commission in its discretion may require an applicant to submit satisfactory evidence of compliance with these state laws. Section 9(b) clearly says that each applicant *shall* submit to the Commission satisfactory evidence, etc. What is satisfactory evidence? The ordinary meaning of the word "satisfactory" in all accepted dictionaries is that the evidence shall be sufficient, shall be complete, shall completely embrace the field. There is no opportunity for construction of these plain words. They mean what they say. Leaving out the reference to "bed and banks" for the time being, Section 9(b) of the Act requires that before a license can be granted that each applicant shall submit satisfactory evidence of compliance with the laws of Iowa with respect to the appropriation, diversion and use of water for power purposes. There is nothing in that phraseology which limits the requirement to property rights of individuals or to property rights of the petitioner. The opinion of this Court is wrong in such assertions. The opinion in this case commencing at the bottom of page 5 of the printed report states that the Commission would have been justified in following its own interpretation of the Act and proceeding with the merits of the application without requiring the petitioner to submit evidence of its compliance with the terms of Chapter 363, or of any other laws of the State of Iowa, which the Commission might hold to be inapplicable or to have been superseded by the Federal Power Act. We submit that this is not a sound pronouncement of law. It is inconceivable that an agency of the government can elect to ignore the plain mandates of Congress. This Court cannot say to an agency of the Federal government that it has the right to override a state law upon a given subject and decide that it is inapplicable or has been superseded by a Federal Act. In *Davies Warehouse Company* v. *Bowles*, 321 U. S. 144, 88 L. Ed. 379, involving the admini-

tration of the Maximum Price Regulations, this Court, mindful of the present necessity to preserve a fundamental principle, refused to interfere with the application of a state statute in a matter which obviously would defeat the authority of the Price Administrator. You there had the following to say:

> "Nor should we rush the trend to centralization where Congress has not. It could never be more appropriate than now to heed the maxim reiterated recently by the Court that 'the extension of federal control into these traditional local domains is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions.' *Yonkers* v. *United States*, No. 109, October Term, 1943, decided January 3, 1944, (U. S. , *ante*, 241, 64 S. Ct. 327); *Palmer* v. *Massachusetts*, 308 U. S. 79, 84, 84 L. Ed. 93, 97, 60 S. Ct. 34, 41 Am. Bankr. Rep. (N.S.) 134. At least in the absence of a congressional mandate to that effect, we cannot adopt a rule of construction otherwise unjustified, to relieve federal administrators of what we may well believe is a substantial burden but one implied by the terms of the legislation when viewed against the background of our form of government."

This Court, in the *Bowles* case, further stated that it is a serious thing to adopt a rule of construction "which precludes the execution of state laws by state authority in a matter normally within state power." Your opinion says loosely that Section 9(b) does not mean that an applicant is required to secure a permit from the state as a condition precedent, and you say to so require would vest in the Executive Council of Iowa a veto power over the Federal project. This is an incorrect statement of the situation. True, the result of compliance with the state law would be the issuance of a state permit. The Iowa law does not arbitrarily say that before one can build anything, regardless of what it is, he must obtain a permit from the state just for the sake of obtaining a permit. The opinion of this Court deals with

the subject as though that were the case, and determines the situation based on the false premise as a contention on our part that Section 9(b) of the Act means that the "consent" of the state as an abstract proposition must be obtained.

On oral argument in answer to a question by Mr. Justice Black, we answered this very proposition and stated that reference to the Iowa permit included the compliance with these regulatory laws of the state with reference to the appropriation, diversion and use of water for power purposes, and that it is the compliance with these regulations in the law evidenced by the issuance of the permit which is important rather than the mere issuance of a permit on a piece of paper.

This Court, on page 8 of its printed opinion, states that Section 7771 of the Iowa law strikes at the heart of the present project. The opinion states that the feature of the project which supposedly commended it to the Federal Power Commission was its diversion of substantially all of the water of the Cedar River near Moscow to the Mississippi River near Muscatine, and that such diversion has long been recognized as an engineering possibility and as constituting the largest power development foreseeable on either the Cedar or Iowa Rivers. The opinion then states that it is this feature that brings this project squarely under the Federal Power Act. In other words, this Court says that for the strictly single purpose of creating a power project only, the mere proposal of the project gives the Commission jurisdiction and that, therefore, having obtained jurisdiction it should then proceed to destroy the river and to destroy any possible commerce among the states as it allegedly existed from or over this river. This is indeed an unusual pronouncement.

You have already said in *United States v. Appalachian Electric Power Company*, 311 U. S. 377, 426; 85 L. Ed. 243, 262, as follows:

"The United States cannot by calling a project of its own a 'multiple purpose dam' give to itself additional powers, but equally truly respondent cannot, by seeking to use a navigable waterway for power generation alone, avoid the authority of the Government over the stream. That authority is as broad as the needs of commerce. Water power development from dams in navigable streams is from the public's standpoint a by-product of the general use of the rivers for commerce."

The opinion of the Court undertakes to interpret Section 9(b) of the Federal Power Act by reference to its legislative history. The quotation from the statement by Representative William L. LaFollette of Washington set out on page 11 of the printed opinion of this Court is not applicable to the point for which it is cited. The discussion referred to was in regard to the debate which lead to the insertion into Section 9(b) of the three words "bed and banks". The Section as already submitted by the Committee provided that each applicant shall submit to the Commission "satisfactory evidence that the applicant has complied with the requirements of the laws of the state or states within which the proposed project is to be located with respect to the appropriation, diversion and use of water for power purposes". Mr. LaFollette moved to insert therein "bed and banks" so that the provision would read—"with respect to bed and banks and to the appropriation, diversion and use of water for power purposes". The Court on page 11 of its opinion refers only to the reasons for inserting "bed and banks". There is no question but that the title to the "bed and banks" below the meandered line or high water line is in the states for the benefit of the public. Mr. LaFollette wanted all rights as to bed and banks included in the requirements of Section 9(b) because if it were left out and the Power Commission did not require a showing as to "bed and banks", then the law might be vulnerable to attack. Mr. LaFollette was not referring in that statement to the other provisions

of the proposed law as they were prior to the insertion of the phrase "bed and banks". We desire to call attention to the following quotation from Mr. LaFollette's statement which the opinion overlooks:

> "If we make it one of the conditions precedent to the procuring of a license that the applicant has complied with the requirements of state law as to bed and banks, diversion, and use of water, we are most assuredly not infringing any state rights in that respect." Cong. Rec. Vol. 56, Part 9, p. 9108.

Further, in this connection, we desire to call the attention of the Court to what Representative Mondell said on the floor of the House in discussing Section 9(b) of the Act. Before Mr. LaFollette's amendment as to "bed and banks" was inserted, Mr. Mondell stated the following:

> "The provision is that the applicant shall have complied with the laws of the State with respect to the appropriation, diversion, or use of water; that is, he shall have complied with all of the laws of the state applicable to the situation up to the time he makes his application." Cong. Rec. Vol. 56, Part 10, Page 9812.

We call attention to Representative Mondell's further statement in explanation of Section 9(b) of the Act:

> "The provision is that the applicant shall comply with the State law. All that the gentleman from California wants him to do is to comply with the State law only so far as the making of the application is concerned. What benefit would it be to the commission that Jones, Smith, or Brown may have picked up a piece of paper and scribbled an application on it and put it in the mail, or perhaps filled out the proper application blank. That gets nowhere and accomplishes nothing. The law of the State is that he shall make his application with certain necessary data and that there shall be in response to that inquiry an investigation as to whether there is water available that can be used to turn a wheel without depriving some one else of a prior right and whether or not the conditions are such that under the State law

such water can be used at that point for power purposes. After the license applicant has completed his waterright application he comes before the commission with his own data verified and full information obtained from the State and permission from the State to proceed, and applies for his license from the Federal Government. But the gentleman from California would cut all this procedure off immediately on the application to the State being made or notice posted on the bank of a stream in a hazel-brush patch, where nobody would see it. There would be nothing on which the commission could act, no procedure had which would inform the commission on questions of vital importance." (Cong. Rec. Vol. 56, Part 10, p. 9814.)

Further, Representative Sinnott in explaining the conference report to the House of Representatives specifically pointed out that the states rights were protected in the Bill, citing Section 9(b) as one of the provisions which protected such rights. He stated as follows:

"Under this Bill we respect the rights of states. In fact, no rights can be granted under this Bill unless the applicant shows that he has complied with the laws of the individual states." (Cong. Rec. Vol. 59. Part 7, p. 6537.)

Again Mr. LaFollette, on another occasion, stated in regard to Section 9(b), as follows:

"Under the proposed law the would-be licensee is supposed to have procured all concessions and necessary powers of the State or States in which the proposed project is situated before a license can be issued, thus harmonizing State and Federal interest, making development possible without either transgressing the sovereign powers of the States or conferring on the Federal Government any plenary power not contemplated by the Constitution. Under this bill we only allow the commission a supervisory power over those functions entirely within the State's jurisdiction for the period covered by any license, the State having exercised its right in advance of issue." (Cong. Rec. Vol. 56, Part 9, p. 9108.)

Furthermore, this Court overlooks completely your pronouncements in *United States* v. *West Virginia*, 295 U. S. 463, 472, 79 L. Ed. 1546, 1552. This Court there said:

> "The bill seeks an injunction against the corporate defendants, restraining only the construction of the dam without a license from the Federal Power Commission. But *Section 9(b) of the Federal Water Power Act requires that every applicant for a license shall present 'satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power * * *'. The mere grant of the state license, which the Federal Water Power Act makes prerequisite to the application for the Federal license, cannot be said to involve any infringement of the federal authority.* It does not appear that the State has done more." (Italics supplied.)

This Court correctly states that Section 9(b) does not in and of itself require compliance with state laws. What it does do is say that the Commission cannot grant a license until the applicant has presented satisfactory evidence of compliance with the state laws described. Surely, the plain language of Section 9(b) cannot be interpreted to mean as stated on page 17 of the printed opinion that the evidence required is merely that which shall be satisfactory to the Commission. We submit that Section 9(b) states that if there are state laws relative to these subject matters the Commission on its own initiative is required to require proof by sufficient and satisfactory evidence that those provisions have been complied with. If there is a dispute as to what they mean, then it is not for the Commission to decide that meaning. It is for the Courts of the State to determine the meaning of its state laws as will be discussed in a subsequent division.

We therefore submit that the opinion of this Court arbitrarily makes a wrong interpretation of the Iowa statutes and of Section 9(b) of the Federal Power Act. We submit that a rehearing must be granted in order to correct this apparent error in the opinion of this Court.

2. The opinion of this Court undertakes to construe and define the meaning of the laws of Iowa before a construction thereof has been made by the Courts of the State of Iowa. This assumption on the part of this Court violates all precedents. The opinion of this Court states on page 12 thereof that the Executive Council which includes the Governor, on July 5, 1944, adopted a resolution directing the Attorney General to intervene in this case before the Court of Appeals and there take steps to sustain the order of the Federal Power Commission because "it is vital to the interests of the State of Iowa that the said order of the Commission be sustained". You then assume and state that this demonstrates that the State of Iowa is not only opposed to the granting of a State permit but is opposed also to the granting of a Federal license for the present project. You also state that this position is based in part on the ground that the State statute as interpreted by the Attorney General in its Petition of Intervention, expresses a policy opposed to the diversion of water from one stream to another in Iowa under such circumstances as the present. You then in effect state that because of this attitude by the officials of Iowa, you are justified in making a construction of the Iowa law although no Iowa Court has yet been called upon to construe it. The opinion gives the State and its laws no consideration whatsoever under its reserve powers under the Tenth Amendment to the Constitution, nor under the plain mandates of the Federal Power Act protecting and reserving to the States the right to protect itself against abuses. The opinion in

effect is an argument for the private project and against the State.

Surely this Court does not intend to say that under the guise of regulating commerce among the States upon the waters of the State, the Federal Government can authorize private individuals to take over the interior waters of the State and use them for private purposes without reckoning with the State laws. By thus interpreting the laws of the State the opinion does violence to all of the precedents upon the subject matter. It is not the province of this Court or of any other Federal Court to determine the meaning of a State law and to decide what the State law means such as is done by the opinion in this case. As stated in the dissent by Mr. Justice Frankfurter, the question of whether the Commission has such satisfactory evidence as is referred to in Section 9(b), depends upon what the requirements of the State laws are. As stated by Mr. Justice Frankfurter "Time out of mind and in a variety of situations, this Court has admonished against the avoidable assumption by this Court of the independent construction of State legislation". Citing *Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 207, 209.

The Power Commission in its brief in this Court recognizes that the Iowa laws on their face are laws with respect to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power within the meaning of Section 9(b) of the Act. Counsel for the Power Commission on page 19 of its brief, refer to the legislative history of the Act and agree that the legislative history bears out the contention of the State in this matter. The Federal Power Commission in disposing of this case properly stated that the appropriate place for the determination of the validity of the State law is in the Courts. The Court of Appeals said it is for the State Court to construe State statutes. On application by the petitioner for a State

permit, the Executive Council of Iowa may decide to grant the application or deny it on a ground wholly unrelated to the Federal Power Act and which would be valid. It is not for this Court to decide that the Executive Council would do other than its duty when afforded an opportunity to pass upon the question under the law. As you have stated in your fact statements in the opinion, the Executive Council has never been afforded an opportunity to consider or pass upon the current project. As stated in *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 423, "To predetermine even in the limited field of water power, the rights of different sovereignties pregnant with future controversies is beyond the judicial function".

We submit that the dissent states the correct principle of law, namely, that this Court should not undertake to construe the statutes of Iowa under the circumstances of this case and that the Federal Power Commission did not err in refusing to construe the Iowa statutes. Note in this case that the private applicant for a license from the Federal Power Commission ignored completely the State of Iowa and the laws of the State of Iowa and made no attempt to comply therewith in any respect.

3. The opinion of this Court ignores the mandate contained in Section 9(b) of the Federal Power Act which provides that each applicant shall submit to the Commission satisfactory evidence that the applicant has complied with the requirements of the laws of the State referred to therein. This Court in its opinion has taken such a broad view and has made such sweeping and comprehensive interpretations of the provisions of the Federal Power Act, that the Intervenor feels it should call the Court's specific attention again to Section 9(b) and to its meaning. If the opinion of this Court is to stand, it in effect renders the provisions of Section 9(b) of the Federal Power Act ineffective and worthless.

There can be no question but that all of the legislative history referred to in our brief on the original submission show clearly that Section 9(b) requires a full showing that the State laws relative to the use, diversion and appropriation of the water in the rivers of the State had been complied with. In this case none of the State laws have been complied with. This Court refers the case back to the Commission and says that the Commission will not act as a substitute for local authorities having jurisdiction over such questions as the sufficiency of the legal title of the applicant to its riparian rights or to the validity of its local franchises if any, relating to proposed intra-state public utility service. The opinion states that Section 9(b) says that the Commission may *wish* to have satisfactory evidence of progress made by the applicant toward meeting local requirements, but that it does not say that the Commission is to assume responsibility for the legal sufficiency of the steps taken. Section 9(b) does not say that the Commission may *wish* to have satisfactory evidence. It says the applicant *shall submit* satisfactory evidence that it *has complied* with the requirements of the State laws described.

If on remand, as stated in the opinion, the Commission is not to be permitted to pass upon the validity of state franchises, and water rights, then the case is right back where we now are, because we insist that this same situation now exists. In other words, neither the Commission nor this Court can substitute itself for the Executive Council of Iowa, and determine for the Council whether applicant has sufficiently complied with the Iowa laws leading to a franchise-permit. Section 9(b) says applicant *shall* present satisfactory evidence of compliance with such state laws.

The opinion rightly states that the Commission cannot substitute itself for the local authorities as to the validity of local franchises. The Iowa law here in question, if sat-

isfactorily complied with, results in the granting of a franchise from the State in the form of a permit. Simply because the law calls it a permit does not prevent the permit from also being a franchise. Furthermore, while it has not heretofore been mentioned because it was never considered necessary in view of the plain language of the law and of the prior administrative history of Section 9(b) by the Commission, there is a further provision of the Iowa law which is specifically referred to in Section 9(b) which has not been complied with. Note that Section 9(b) of the Act provides that the applicant shall submit satisfactory evidence of compliance with the requirements of the law of the States with respect "to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this Act". Chapter 363 of the Code of Iowa contains many provisions which pertain to these subjects. Further, there are other provisions of Iowa law not heretofore mentioned which require a franchise. Chapter 383 of the Code of Iowa (and the complete Code was introduced into evidence before the Power Commission) provides in Section 8309 thereof that:

> "No individual, company or corporation shall erect, maintain, or operate any transmission line, wire, or cable along, over, or across any public highway or ground and outside of cities and towns for the transmission, distribution, or sale of electric current, without first procuring from the Iowa State Commerce Commission or from the Board of Supervisors in the County of each of the respective Counties in which such transmission line is to be constructed or operated, a franchise granting authority to do so as in this Chapter provided."

The subsequent provisions of the Chapter set out requirements as to the petition and the notice for hearing, objections, form of the franchise, and other regulatory matters, supervision of construction, location, manner of con-

struction, and many other provisions none of which have been complied with by the applicant. Suppose the applicant does build its project, how is it going to run its transmission wires and lines in the State of Iowa and use the public lands of the State without a franchise as required by Chapter 383 of the Code of Iowa? It should first secure this franchise and then go to the Power Commission and prove its franchise by satisfactory evidence as required by Section 9(b) of the Act.

The above matters are among the many reasons why the opinion of this Court is wrong and why a rehearing should be granted so that the matter can again be presented and reviewed by this Court in the public interest.

III.

Federal Power Act Does Not Authorize Destruction of Rivers for Private Purposes.

It is further submitted that the opinion of this Court is clearly erroneous in holding that the Federal Power Commission under the Federal Power Act has jurisdiction under the guise of navigability of the Cedar River, and then has the authority and the power to destroy not only navigability, but also commerce among the States by a destruction of a large stretch of the River. There could never again be any navigation along the Cedar River and into the Iowa River (assuming that the Rivers were navigable), because of the destruction of the lower twenty-one miles of the Cedar River by this project. There is no way that navigation could be carried on through this narrow canal and over a one hundred foot drop along the canal which the project contemplates. Even though it were possible to construct locks, which it is not, it would take all the water in the Cedar River to operate the locks, and there would be none left for the power project.

This Court should take particular notice of the fact that this is not the Federal Government which is seeking to build

this project in the Cedar River for a governmental purpose. It is a private concern seeking to take the public waters of the State and to divert, use, and appropriate them completely for a private commercial purpose. Surely it was never the intention of Congress that such a thing should be done. As stated by this Court in the *Appalachian* case, *supra*:

> "The flow of a navigable stream is in no sense private property; 'that the running water in a great navigable stream is capable of private ownership is inconceivable'." (311 U. S. 377, 424.)

The opinion argues as though this private applicant is virtually a part of the Federal Government and that the State should not have anything to say about the project, even though the State may be irreparably damaged by it.

The Ninth Circuit Court in *United States* v. *Central Stockholders Corporation of Vallejo*, 52 F. (2d) 322 stated our contention as follows:

> "The Supreme Court held in the *Ford* case (*Ford & Son* v. *Little Falls Co.*, 280 U. S. 369, 50 S. Ct. 140, 75 L. Ed. 483), in effect, that it was not the intention of Congress to vest any portion of its sovereign power in the permittee, and, assuming that the government might have exercised its control over navigable streams by and through a permittee under the Federal Water Power Act, that it was not the intention of the Government so to do."

The present case involved just such an issue. This Court should follow the logic of the Ninth Circuit Court in this respect. If the opinion in this case is to stand as written, a private party could divert the Des Moines River in the center of Iowa and turn all of its water through a canal eastward to the Mississippi River and thus destroy the rest of the Des Moines River, if the Power Commission should grant a license. The State would be helpless to stop it, under this decision. Furthermore, as stated by the Court of Ap-

peals in its opinion, such a construction of the Federal Power Act would create a situation where the Federal Power Commission could grant a license, if so minded, to a private party to flood the State Capitol for a private purpose. Such a construction and view of the Federal Power Act we submit is intolerable. If such a diversion can be accomplished under the law in spite of the objection of the State, for eight or ten miles, it can be done for a hundred miles. Surely no such intention on the part of Congress can be gleaned from the language of the Federal Power Act. If for no other reason than this, a rehearing should be granted and the matter reconsidered and the opinion of this Court rewritten.

IV.

Applicant Has Not Complied With Either the Law or the Regulations of the Commission.

The opinion errs in not affirming the position of the Court of Appeals for the District of Columbia and the decision of the Federal Power Commission, because the record of the proceedings before the Power Commission and as certified to this Court and as recited in the opinion of this Court, shows clearly that the applicant has not complied with either the applicable provisions of law nor the rules and regulations promulgated by the Federal Power Commission. We adopt what we have said heretofore about the requirements of Section 9(b) of the Federal Power Act and the requirement that satisfactory evidence be adduced by the applicant herein of compliance with the laws of Iowa referred to. We desire also to call the attention of the Court to a further matter in the opinion which is inconsistent with the opinion.

The applicant herein not only has failed to comply with Section 9(b) of the Act, but has failed to comply with the Rules and Regulations of the Commission promulgated by the

Commission and applicable to this situation. Pursuant to its authority, the Commission adopted rules and regulations as contained in Section 4.41, and in Exhibit "D" and Exhibit "E" thereof. These provisions of the Regulations are set out in the footnote on page 11 of the printed opinion of this Court. Exhibits "D" and "E" of Regulation 4.41 specifically provide that:

> Sec. 4.41. "There shall be filed with the application for license and as a part thereof, the following Exhibits certified in conformity with Section 200.4: * * *
>
> Exhibit 'D'. Evidence that the applicant has complied with the requirements of the laws of the State or States within which the project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business, necessary to effect the purposes of the license applied for, including a certificate of convenience and necessity, if required. *This evidence shall be accompanied by a statement of the steps that have been taken and the steps that remain to be taken to acquire franchise or other rights from States*, counties, and municipalities before the project can be completed and put into operation.
>
> Exhibit 'E'. The nature, extent, and ownership of water rights which the applicant proposes to use in the development of the project covered by application, *together with satisfactory evidence that the applicant has proceeded as far as practicable in perfecting its rights to use sufficient water for proper operation of the project works. A certificate from the proper State agency setting forth the extent and validity of the applicant's water rights shall be appended if practicable.* In case the approval or permission of one or more States agencies is required by State law as a condition precedent to the applicant's right to take or use water for the operation of the project works, duly certified evidence of such approval or permission, or a showing of cause why such evidence cannot be reasonably submitted shall also

be filed. *When a State certificate is involved, one certified copy and three uncertified copies shall be submitted.*" (Emphasis ours.)

It will be observed that Regulation Exhibit "D" requires that the evidence shall be accompanied by a statement of the steps remaining to be taken to acquire a franchise or other rights from States before the project can be completed and put into operation. Also it will be observed in Exhibit "E" that it is required that the applicant present satisfactory evidence that it has proceeded as far as practicable in effecting its right to use sufficient water for proper operation of the project works. That can mean but one thing,—that it has secured a franchise or permit from the State of Iowa in the case at bar. The laws of the State of Iowa require such information as will determine that very thing. The Executive Council has a right to pass upon the project in the light of other uses which the State might desire to make of the water. Admittedly the applicant herein has not complied with this Regulation of the Commission. The opinion overlooks this fact and in view of the fact statement set out in the opinion, this Court should give consideration to this phase of the case. We submit that when proper consideration is given to it, that this Court can do nothing else under the facts than affirm the action of the Power Commission and the decision of the Court of Appeals for the District of Columbia.

CONCLUSION.

The pronouncements in the opinion of the Court in this case are of very vital and grave importance to all of the people of the United States. While we recognize that the Federal Government has complete plenary power over navigable streams of the United States as defined and included under the commerce clause of the Federal Constitution, yet we submit that a fiction can not be set up by an agency of

the Federal Government to assume jurisdiction, where none exists in fact or in law.

We have argued under the first proposition of this petition that the Cedar River is non-navigable and that therefore the Federal Power Act should not attach. We sincerely believe that it is non-navigable. In submitting the other propositions we make our presentation upon the assumption for the purposes of the presentations, that the Cedar River is a navigable water of the United States under the commerce clause. In either case we submit that the State of Iowa, the intervenor herein, is entitled to a rehearing for all of the reasons stated.

We submit that when this case is resubmitted and argued further, that this Court should withdraw the opinion herein and file an opinion affirming the decision of the Power Commission and the opinion of the Court of Appeals for the District of Columbia in this matter.

Respectfully submitted,

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CERTIFICATE.

The undersigned counsel for the Petitioner for a Rehearing certify that this petition is filed in good faith and not for the purpose of delay.

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pp. 21, 22, 24, 10, 1;

SUPREME COURT OF THE UNITED STATES.

No. 603.—October Term, 1945.

First Iowa Hydro-Electric Cooperative, Petitioner, *vs.* Federal Power Commission. State of Iowa, Intervenor.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[April 29, 1946.]

Mr. Justice Burton delivered the opinion of the Court.

This case illustrates the integration of federal and state jurisdictions in licensing water power projects under the Federal Power Act.[1] The petitioner is the First Iowa Hydro-Electric Cooperative, a cooperative association organized under the laws of Iowa with power to generate, distribute and sell electric energy. On June 29, 1940, pursuant to § 23(b)[2] of the Federal Power Act, it filed with the Federal Power Commission a declaration of intention to construct and operate a dam, reservoir and hydro-electric power plant on the Cedar River, near Moscow, Iowa.[3]

January

[1] 41 Stat. 1063, as amended, 49 Stat. 838, 16 U. S. C. §§ 791a-825r.

[2] "Sec. 23. . . . (b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands . . . of the United States . . . except under and in accordance with the terms of . . . a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands . . . are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws." 49 Stat. 846, 16 U. S. C. § 817.

[3] This described a project including an 8,500 foot earthen dam, and a power plant of three 5,000 kw. hydraulic turbine generators operating under a

On April 2, 1941, it also filed with the Commission an application for a license, under the Federal Power Act, to construct an enlarged project essentially like the one it now wishes to build. The cost of the enlarged project is estimated at $14,600,000. It calls for an 8,300 foot earthen dam on the Cedar River near Moscow, an 11,000 acre reservoir at that point and an eight mile diversion canal to a power plant to be built near Muscatine on the Mississippi. The canal will create two other reservoirs totaling 2,000 acres. It is alleged that the three reservoirs incidentally will provide needed recreational facilities. The power plant will have four turbo-generating units with a total capacity of 50,000 kw., operating with an average head of 101 feet of water provided by the fall from the canal to the Mississippi. Water will be pumped from the Mississippi up to the head bays of the power intake dam at the plant to meet possible shortages in supply. The tailrace will extend for a mile along the shore of the Mississippi to a point below Dam 16 on that River. Transmission lines will connect the project with a source of steam standby electric current at Davenport, Iowa, 24 miles up the Mississippi. The plant is expected to produce 200,000,000 kwh. of marketable power per year, of which 151,000,000 kwh. will be firm energy in an average year. Interchange of energy is proposed with the Moline-Rock Island Manufacturing Company near Davenport and the project is suggested as an alternative to the addition of a 50,000 kw. unit to the plant of that company. The power will be available especially to non-profit rural electrification cooperative associations and to cities and towns in 35 or more nearby counties.

The Cedar River rises in Minnesota and flows 270 miles southeasterly through Iowa to Moscow which is 10 miles west of the Mississippi. From there it flows southwesterly 29 miles to Columbus Junction where it joins the Iowa River and returns southeasterly 28 miles to the Mississippi. The proposed diversion will take all but about 25 c.f.s. of water from the Cedar River at Moscow. This will correspondingly reduce the flow in the Iowa River while the diverted water will enter the Mississippi at Muscatine about 20 miles above its present point of entry at the mouth of the Iowa River. There are no cities or towns on the Cedar River between Moscow and Columbus Junction and the record indicates

maximum head of 35 feet, with an estimated output of 47,000,000 kwh. per year. The water was to be returned to the Cedar River immediately below the dam.

that the petitioner has options upon 98% of the riparian rights on the Cedar River in that area. At petitioner's request, this application was treated as a supplement to its then pending declaration of intention to construct the smaller project.

On June 3, 1941, the Commission made the following findings:

"(1) That the Cedar and Iowa Rivers are navigable waters of the United States;

(2) That the diversion of water from the Cedar River by means of the diversion canal as set forth above would have a direct and substantial effect upon the flow and stage of the Iowa River and hence would affect the navigable capacity of that river;

(3) That the alternate withholding of water in the reservoir and canal during periods of shut-down of the power plant and the release of water at substantial rates of flow during periods of operation of the power plant, as set forth above, would cause extreme fluctuations in the flow of the Mississippi River at Muscatine, Iowa, and would substantially affect the navigable capacity of that river;

(4) That the interests of interstate commerce would be affected by construction of the project as described in the declaration of intention as supplemented;

(5) That the two small islands . . . [in the Cedar River] are public lands of the United States and will be partly or wholly flooded by the reservoir of the proposed project and will be occupied by the project;

(6) That a license for the construction proposed above is required under the provisions of the Federal Power Act." 2 Fed. Power Comm. Rep., 958.[4]

On August 11, 1941, the petitioner, pursuant to that finding, filed with the Commission an application for a license to construct the project above described. On November 4, 1941, the Commis-

[4] On February 7, 1940, the Commission had sent notice to the Governor of Iowa of the filing of the original declaration of intention and invited him to present information and comments relative thereto. The State, however, took no part in the proceedings. The record also indicates that twice in the three years before the present proceeding, the Executive Council of the State of Iowa rejected applications of the petitioner requesting state permits to construct a dam near Moscow comparable to that proposed in all of these proceedings, but not including a diversion of water from the Cedar to the Mississippi River. The last application of the petitioner to the Council for such a permit was filed August 12, 1940, and rejected June 25, 1941. No application has been made by the petitioner to the Executive Council for a state permit for construction of the project including the canal diverting most of the flow of the Cedar River to the Mississippi and providing for a plant and tailrace on the bank of the Mississippi. In its petition to intervene in the present proceeding for a federal license, the State alleged that such a diversion would violate § 7771 (in Chapter 363) of the Code of Iowa, 1939. That allegation touches the principal question in this case.

sion granted the State of Iowa's petition to intervene and, since then, the State has opposed actively the granting of the federal license.

On January 29, 1944, after extended hearings, the Commission rendered an opinion including the following statements:

> "As first presented, the plans of the applicant for developing the water resources of the Cedar river were neither desirable nor adequate, but many important changes in design have been made. [The opinion here quoted in a footnote § 10(a) of the Federal Power Act.][5] The applicant has also agreed to certain modifications proposed by the Chief of Engineers of the War Department. The present plans call for a practical and reasonably adequate development to utilize the head and water available, create a large storage reservoir, and make available for recreational purposes a considerable area now unsuitable for such use, all at a cost which does not appear to be unreasonable.
>
> "Further changes in design may be desirable, but they are minor in character and can be effected if the applicant is able to meet the other requirements of the act." *Re First Iowa Hydro-Electric Cooperative*, 52 PUR (NS) 82, 84.

We believe that the Commission would have been justified in proceeding further at that time with its consideration of the petitioner's application upon all the material facts. Such consideration would have included evidence submitted by the petitioner pursuant to § 9(b)[6] of the Federal Power Act as to the petitioner's compliance with the requirements of the laws of Iowa with respect to the petitioner's property rights to make its proposed use of the

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[5] "Sec. 10. All licenses issued under this Part shall be on the following conditions:

"(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval." 49 Stat. 842, 16 U. S. C. § 803(a).

[6] "Sec. 9. That each applicant for a license hereunder shall submit to the commission—

. . . . . .

"(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act." 41 Stat. 1068, 16 U. S. C. § 802(b).

affected river beds and banks and to divert and use river water for the proposed power purposes, as well as the petitioner's right, within the State of Iowa, to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of the license. The Commission, however, was confronted at that point with a claim by the State of Iowa that the petitioner must not only meet the requirements for a federal license for the project under the Federal Power Act, but should also present satisfactory evidence of its compliance with the requirements of Chapter 363 of the Code of Iowa, 1939, hereinafter discussed, for a permit from the State Executive Council of Iowa for the same project.

While it now appears, from its brief and the argument in this Court, that it is the opinion of the Federal Power Commission that the requirements of Chapter 363 of the Code of Iowa as to this project have been superseded by those of the Federal Power Act, yet, at the time of the original hearing, the Commission felt that the courts were the appropriate place for the decision on Iowa's contention as to the applicability and effectiveness of Chapter 363 of its Code in relation to this project. The Commission decided, therefore, to proceed no further until that question had been decided by the courts, and dismissed the petitioner's application, without prejudice, in accordance with the following explanation stated in its opinion:

> "The appropriate place for a determination of the validity of such state laws is in the courts and, if we dismiss the application for license on the basis of failure to comply with the requirements of § 9(b), applicant may seek review of our action and its contentions under § 313(b) of the Federal Power Act." 52 PUR (NS) 82, 85.

The Commission also expressly found that—

> "The applicant has not presented satisfactory evidence, pursuant to § 9(b) of the Federal Power Act, of compliance with the requirements of applicable laws of the state of Iowa requiring a permit from the State Executive Council to effect the purposes of a license under the Federal Power Act, and the pending application, as supplemented, should be dismissed without prejudice;" *id.* at 85.

This action, after all, did not save the Commission from passing on the issue, for the order of dismissal was a ruling upon it, adverse both to the petitioner's contentions and to its own views on the law. The Commission would have been justified in follow-

ing its own interpretation of the Federal Power Act and proceeding with the merits of the application without requiring the petitioner to submit evidence of its compliance with the terms of Chapter 363, or of any other laws of the State of Iowa, which the Commission held to be inapplicable or to have been superseded by the Federal Power Act.

On the applicant's petition for review of the dismissal, it was affirmed by the United States Court of Appeals for the District of Columbia. 151 F. 2d 20. We then granted certiorari under § 240(a) of the Judicial Code, 28 U. S. C. § 347, and § 313(b) of the Federal Power Act, 49 Stat. 860, 16 U. S. S. § 825*l*, because of the importance of the case in applying the Federal Power Act.

The findings made by the Commission on June 3, 1941, in response to the petitioner's declaration of intention are not in question. For the purposes of this application it is settled that the project will affect the navigability of the Cedar, Iowa and Mississippi Rivers, each of which has been determined to be a part of the navigable waters of the United States; will affect the interests of interstate commerce; will flood certain public lands of the United States; and will require for its construction a license from the Commission.[7] The project is clearly within the jurisdiction of the Commission under the Federal Power Act. The question at issue is the need, if any, for the presentation of satisfactory evidence of the petitioner's compliance with the terms of Chapter 363 of the Code of Iowa. This question is put in issue by the petition for review of the order of the Commission which dis-

[7] "Sec. 4. The Commission is hereby authorized and empowered—

. . . . . .

"(e) To issue licenses . . . to any corporation organized under the laws of the United States or any State thereof, . . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands . . . of the United States . . . : *Provided further*, That no license affecting navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: . . . ." 49 Stat. 840, 16 U. S. C. § 797(e). See also, § 23(b), note 2, *supra*.

missed the application solely on the ground of the failure of the petitioner to present such evidence. The laws of Iowa which that State contends are applicable and require a permit from its Executive Council to effect the purposes of the federal license are all in §§ 7767-7796.1 of the Code of Iowa, 1939, constituting Chapter 363, entitled "Mill Dams and Races." Section 7767 of that chapter is alleged to require the issuance of a permit by the Executive Council of the State, and is the one on which the Commission's order must depend. It provides:

> "7767 Prohibition—permit. No dam shall be constructed, maintained, or operated in this state in any navigable or meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation, or municipality constructing, maintaining, or operating the same."[8]

To require the petitioner to secure the actual grant to it of a State permit under § 7767 as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State the "comprehensive" planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government.[9]

The Commission's order of dismissal avoids this extreme result because, instead of charging the petitioner with failure to present satisfactory evidence of the actual grant to it of a State permit, the order charges the petitioner with failure to present satisfactory evidence merely of its "compliance with the requirements of applicable laws of the State of Iowa requiring a permit from the State Executive Council." While this avoids subjecting the petitioner to an arbitrary and capricious refusal of the permit it does not meet the substance of the objection to the order. For example, § 7776 of the State Code requires that "the method of construction, operation, maintenance, and equipment of any and all dams in such waters shall be subject to the approval of the executive council." This would subject to State control the very requirements of the project that Congress has placed in the discretion

[8] Sections 7771, 7776, 7792 and 7796 of Chapter 363 have a less direct relation to the issue but would be superseded by the Federal Power Act if § 7767 is superseded by it.

[9] See § 10(a), note 5, *supra;* § 23(b), note 2, *supra;* and § 4(e), note 7, *supra.*

of the Federal Power Commission.[10] A still greater difficulty is illustrated by § 7771. This states the requirements for a State permit as follows:

> "7771 When permit granted. If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and *any water taken from the stream in connection with the project is returned thereto at the nearest practicable place* without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit, upon such terms and conditions as it may prescribe." (Italics supplied.)

This strikes at the heart of the present project. The feature of the project which especially commended it to the Federal Power Commission was its diversion of substantially all of the waters of the Cedar River near Moscow, to the Mississippi River near Muscatine. Such a diversion long has been recognized as an engineering possibility and as constituting the largest power development forseeable on either the Cedar or Iowa Rivers.[11] It is this diversion that makes possible the increase in the head of water for power development from a maximum of 35 feet to an average of 101 feet, the increase in the capacity of the plant from 15,000 kw. to 50,000 kw. and its output from 47,000,000 kwh. to 200,000,000 kwh. per year. It is this diversion that led the Federal Power Commission, on January 29, 1944, to make its favorable appraisal of the enlarged project in contrast to its unfavorable appraisal.

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[10] See § 10(a), note 5, *supra;* and also:

"Sec. 10. All licenses issued under this Part shall be on the following conditions: . . .

"(b) That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder . . . without the prior *approval of the Commission*; and any emergency alteration or addition so made shall thereafter be subject to such modification and change *as the Commission may direct.*

"(c) That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as *the Commission may from time to time prescribe* for the protection of life, health, and property. . . . . " 49 Stat. 842, 16 U. S. C. § 803(b) and (c). (Italics supplied.)

[11] Report from the Chief of Engineers on the Iowa River and its tributaries made in 1929 covering navigation, flood control, power development and irrigation. H. R. Doc. No. 134, 71st Cong., 2d Sess., 86, 87, 90.

and to the State's rejection, of the smaller project. It is this feature that brings this project squarely under the Federal Power Act and at the same time gives the project its greatest economic justification.

If a State permit is not required, there is no justification for requiring the petitioner, as a condition of securing its federal permit, to present evidence of the petitioner's compliance with the requirements of the State Code for a State permit. Compliance with State requirements that are in conflict with federal requirements may well block the federal license. For example, compliance with the State requirement, discussed above, that the water of the Cedar River all be returned to it at the nearest practicable place would reduce the project to the small one which is classified by the Federal Power Commission as "neither desirable nor adequate." Similarly, compliance with the engineering requirements of the State Executive Council, if additional to or different from the federal requirements, may well result in duplications of expenditures that would handicap the financial success of the project. Compliance with requirements for a permit that is not to be issued is a procedure so futile that it cannot be imputed to Congress in the absence of an express provision for it. On the other hand, there is ample opportunity for the Federal Power Commission, under the authority expressly given to it by Congress, to require by regulation the presentation of evidence satisfactory to it of the petitioner's compliance with any of the requirements for a State permit on the state waters of Iowa that the Commission considers appropriate to effect the purposes of a federal license on the navigable waters of the United States. This evidence can be required of the petitioner upon the remanding of this application to the Commission.

In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the states from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two cooperating agencies of Government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue. Where the Federal Government supersedes the state government there is no suggestion that the

two agencies both shall have final authority. In fact a contrary policy is indicated in §§ 4(e), 10(a)(b) and (c), and 23(b).[12] In those sections the Act places the responsibility squarely upon federal officials and usually upon the Federal Power Commission. A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable. "Compliance with the requirements" of such a duplicated system of licensing would be nearly as bad. Conformity to both standards would be impossible in some cases and probably difficult in most of them.[13] The solution adopted by Congress, as to what evidence an applicant for a federal license should submit to the Federal Power Commission, appears in § 9 of its Act. It contains not only subsection (b)[14] but also subsections (a) and (c).[15] Section 9(c) permits the Commission to secure from the applicant "Such additional information as the commission may require." This enables it to secure, *in so far as it deems it material*, such parts or all of the information that the respective states may have prescribed in state statutes as a basis for state action. The entire administrative procedure required as to the present application for a license is described in § 9 and in the Rules of Practice and Regulations of the Commission.[16]

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[12] See notes 7, 5, 10 and 2, *supra*.

[13] In addition to those given in the text, another example of conflict between the project requirements of the Iowa statutes and those of the Federal Power Act appears in § 7792 of the Iowa Code. That section requires the beginning of construction of the project dam or raceway within one year and the completion of the plant within three years after the granting of the permit. This conflicts with § 13 of the Federal Power Act which makes this largely discretionary with the Federal Power Commission but generally contemplates that the construction be commenced within two years from the date of the license. So in § 7793 of the Iowa Code, the life of a permit conflicts with the term of a license under § 6 of the Federal Power Act.

[14] See note 6, *supra*.

[15] "Sec. 9. That each applicant for a license hereunder shall submit to the commission—

"(a) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

"(c) Such additional information as the commission may require." 41 Stat. 1068, 16 U. S. C. § 802(a) and (c).

[16] These rules and regulations are issued pursuant to §§ ~~301(b)~~, 308 and 309, 49 Stat. 858, 16 U. S. C. §§ 825(b), 825g and 825h, interpreting §§ 4 and 9 of the Federal Power Act. Federal Power Commission Rules of Practice and Regulations, 1938, §§ 4.40-4.51, 18 C. F. R. §§ 4.40-4.51. They cover the field so fully as to leave no purpose to be served by filing comparable informa-

The securing of an Iowa state permit is not in any sense a condition precedent or an administrative procedure that must be exhausted before securing a federal license. It is a procedure required by the State of Iowa in dealing with its local streams and also with the waters of the United States within that State in the absence of an assumption of jurisdiction by the United States over the navigability of its waters. Now that the Federal Government has taken jurisdiction of such waters under the Federal Power Act, it has not by statute or regulation added the state requirements to its federal requirements.

The State of Iowa, in its petition to intervene in the proceedings before the Commission stated in relation to the proposed diversion of water from the Cedar River to the Mississippi: "said diversion would be in direct violation of the provisions of section 7771, Code of Iowa 1939." Also, in the State's motion to intervene in the proceedings before the Court of Appeals, it alleged that "By reason of said provisions of law [§§ 7767 and 7771, Code of Iowa, 1939] and the diversion of water involved in the proposed project of petitioner, the executive council of the state of Iowa could not lawfully grant a permit for the erection of the dam proposed."

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tion required in some alternative form under state laws, as a basis for a state permit. Exhibits D and E, required by § 4.41 of the regulations, are to satisfy § 9(b) of the Federal Power Act and have to do especially with property rights in the use of water under the state laws and do not alter the legal situation presented by the Act itself. These exhibits are described as follows:

"*Exhibit D.*—Evidence that the applicant has complied with the requirements of the laws of the State or States within which the project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business, necessary to effect the purposes of the license applied for, including a certificate of convenience and necessity, if required. This evidence shall be accompanied by a statement of the steps that have been taken and the steps that remain to be taken to acquire franchise or other rights from States, counties, and municipalities before the project can be completed and put into operation.

"*Exhibit E.*—The nature, extent, and ownership of water rights which the applicant proposes to use in the development of the project covered by application, together with satisfactory evidence that the applicant has proceeded as far as practicable in perfecting its rights to use sufficient water for proper operation of the project works. A certificate from the proper State agency setting forth the extent and validity of the applicant's water rights shall be appended if practicable. In case the approval or permission of one or more State agencies is required by State law as a condition precedent to the applicant's right to take or use water for the operation of the project works, duly certified evidence of such approval or permission, or a showing of cause why such evidence cannot be reasonably submitted shall also be filed. When a State certificate is involved, one certified copy and three uncertified copies shall be submitted." Federal Power Commission Rules of Practice and Regulations, effective June 1, 1938, pp. 21-22.

Furthermore, the Executive Council, which includes the Governor of the State, on July 5, 1944, adopted a resolution directing the Attorney General of Iowa to intervene in this case before that court and "thereby take steps to sustain the said order of the Federal Power Commission [dismissing the petitioner's application for a federal license]" because "it is vital to the interests of the State of Iowa that the said order of the Commission be sustained." This demonstrates that the State of Iowa not only is opposed to the granting of a State permit but is opposed also to the granting of a federal license for the project. This opposition is based at least in part on the ground that the State statute, as interpreted by the State officials, expresses a policy opposed to the diversion of water from one stream to another in Iowa under such circumstances as the present.

Accepting this as the meaning of Section 7771 of the Iowa Code brings us to consideration of the effect of the Federal Power Act upon it and the related State statutes. We find that when that Act is read in the light of its long and colorful legislative history, it discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the nation and a determination to avoid unconstitutional invasion of the jurisdiction of the states. The solution reached is to apply the principle of the division of constitutional powers between the state and Federal Governments. This has resulted in a dual system involving the close integration of these powers rather than a dual system of futile duplication of two authorities over the same subject matter.

The Act leaves to the states their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce, administer the public lands and reservations of the United States and, in certain cases, exercise authority under the treaties of the United States. These sources of constitutional authority are all applied in the Federal Power Act to the development of the navigable waters of the United States.[17]

[17] The Federal Government took its greatest step toward exercising its jurisdiction in this field by authorizing federal licenses, under the Federal Water Power Act of 1920 (41 Stat. 1063), for terms of 50 years for the development of water power in the navigable waters of the United States. That Act was limited in 1921 by the exclusion from it of water power projects in national parks or national monuments. 41 Stat. 1353. The Commission was reorganized so as to improve its administrative capacity in 1930. 46 Stat. 797. The Act was generally revised and perfected on

The closeness of the relationship of the Federal Government to these projects and its obvious concern in maintaining control over their engineering, economic and financial soundness is emphasized by such provisions as those of § 14 authorizing the Federal Government, at the expiration of a license, to take over the licensed project by payment of "the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken," plus an allowance for severance damages. The scope of the whole program has been further aided, in 1940, by the definition given to navigable waters of the United States in *United States* v. *Appalachian Power Co.*, 311 U. S. 377. "Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. *Gibbons* v. *Ogden*, 9 Wheat. 1, to *United States* v. *Appalachian Power Co.*, 311 U. S. 377." *Northwest Airlines* v. *Minnesota*, 322 U. S. 292, 303.

It was in the light of these developments that this petitioner, in April, 1941, made application for a federal license for this enlarged project. This project thus illustrates the kind of a development, in relation to interstate commerce and to the navigable waters of the United States, that is brought forth by the new recognition of its value when viewed from the comprehensive viewpoint of the Federal Power Commission. Until 1941, this enlarged project had remained dormant at least from the time

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August 26, 1935, 49 Stat. 803, when it received the name of the Federal Power Act. It was then made Part I of Title II of the Public Utility Act of 1935.

This last step was shortly after the decision of this Court in United States v. West Virginia, 295 U. S. 463, and it has served to clarify the law as it existed prior to that decision. Among other things this last step amended § 23 so as expressly to require a federal license for every water power project in the navigable waters of the United States. It also made mandatory, instead of discretionary, the filing with the Federal Power Commission of a declaration of intention by anyone intending to construct a project in such navigable waters over which Congress had jurisdiction under its authority to regulate commerce. It continued its recital of permission to construct such projects upon compliance with the state laws, rather than with the Federal Power Act, provided the projects were not in navigable waters of the United States, did not affect the interests of interstate or foreign commerce and did not affect the public lands or reservations of the United States. These amendments sharpened the line between the state and federal jurisdictions and helped to make it clear that the Federal Government was assuming responsibility through the Federal Power Commission for the granting of appropriate licenses for the development of water power resources in the navigable waters of the United States. See also the rapid development of federal projects shown in the Annual Reports of the Federal Power Commission 1921-1945.

when its value was recognized in the report to Congress filed by the War Department in 1920.[18]

Further light is thrown upon the meaning of the Federal Power Act by the statement, made by Representative William L. LaFollette of Washington, a member of the Special Committee on Water Power, which reported the bill which later became the Federal Water Power Act of 1920. In the debate which led to the insertion in § 9(b) of the reference to state laws as to the bed and banks of streams, he said:

> "The property rights are within the State. It can dispose of the beds, or parts of them, regardless of the riparian ownership of the banks, if it desires to, and that has been done in some States. If we put in this language, which is practically taken from that Supreme Court decision [*United States* v. *Cress*, 243 U. S. 316], as to the property rights of the States as to the bed and the banks and to the diversion of the water, then it is sure that we have not infringed any of the rights of the States in that respect, or any of their rules of property, and *we are trying in this bill above everything else to overcome a divided authority and pass a bill that will make it possible to get development.* We are earnestly trying not to infringe the rights of the States. If possible we want a bill that can not be defeated in the Supreme Court because of omissions, because of the lack of some provision that we should have put in the bill to safeguard the States." 56 Cong. Rec. 9810. (Italics supplied.)

As indicated by Representative LaFollette, Congress was concerned with overcoming the danger of divided authority so as to bring about the needed development of water power and also with the recognition of the constitutional rights of the states so as to sustain the validity of the Act. The resulting integration of the respective jurisdictions of the state and Federal Governments, is illustrated by the careful preservation of the separate interests of the states throughout the Act, without setting up a divided authority over any one subject.[19]

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[18] H. R. Doc. No. 134, 71st Cong., 2d Sess., reflecting the recommendations of the District Engineer, pp. 8-90; Division Engineer, p. 90; Mississippi River Commission, pp. 90-93; Board of Engineers for Rivers and Harbors, pp. 3-8; and the Chief of Engineers, pp. 1-3. See especially pp. 86, 87, 90.

[19] Instances of such provisions are the following: § 4(a) and (e), cooperation of the Commission with the executive departments and other agencies of the State and National Governments is required in the investigation of such subjects as the utilization of water resources, water power industry, location, capacity, development costs and the relation to markets of power sites, and the fair value of power. § 4(f), notice of application for a per-

Sections 27 and 9 are especially significant in this regard. Section 27 expressly "saves" certain state laws relating to property rights as to the use of water, so that these are not superseded by the terms of the Federal Power Act. It provides:

> "Sec. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 41 Stat. 1077, 16 U. S. C. § 821.

Section 27 thus evidences the recognition by Congress of the need for an express "saving" clause in the Federal Power Act if the usual rules of supersedure are to be overcome. Sections 27 and 9(b) were both included in the original Federal Water Power Act of 1920 in their present form. The directness and clarity of § 27 as a "saving" clause and its location near the end of the Act emphasizes the distinction between its purpose and that of § 9(b) which is included in § 9, in the early part of the Act, which deals with the marshalling of information for the consideration of a new federal license. In view of the use by Congress of such an adequate "saving" clause in § 27, its failure to use similar language in § 9(b) is persuasive that § 9(b) should not be given the same effect as is given to § 27.

The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words "other uses." Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes. This was so held in an early decision by a District Court, relating to § 27 and upholding the constitutionality of the Act, where it was stated that "a proper construction of the act requires that the

liminary permit is to go to any State or municipality likely to be interested. § 7(a), in issuing permits and licenses preference is to be given to States and municipalities. § 10(e), licenses to States and municipalities under certain circumstances shall be issued and enjoyed without charge. § 14, a right is reserved not only to the United States but to any State or municipality to take over any licensed project at any time by condemnation and payment of just compensation. §§ 19 and 20, regulation of service and rates is preserved to the states.

words 'other uses' shall be construed ejusdem generis with the words 'irrigation' and 'municipal.'" *Alabama Power Co.* v. *Gulf Power Co.*, 283 Fed. 606, 619.

This section therefore is thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that, in those fields where rights are not thus "saved" to the states, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course.[20]

Section 9(b)[21] does not resemble § 27. It must be read with § 9(a) and (c).[22] The entire section is devoted to securing adequate information for the Commission as to pending applications for licenses. Where § 9(a) calls for engineering and financial information, § 9(b) calls for legal information. This makes § 9(b) a natural place in which to describe the evidence which the Commission shall require in order to pass upon applications for federal licenses. This makes it a correspondingly unnatural place to establish by implication such a substantive policy as that contained in § 27 and which, in accordance with the contentions of the State

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[20] The legislative history of § 27 confirms these conclusions. The language is similar to that of § 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U. S. C. § 383, which provides, "nothing [in several listed sections] in this Act shall be construed as affecting or intended to affect or in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, ..."

This restricted clause, appeared in a modified and broader form in the Ferris Public Lands Bill of 1916, H. R. No. 408, 64th Cong., 1st Sess.:

"Sec. 13. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water."

It also had appeared as § 14 of the Ferris Bill of 1914, H. R. No. 16673, 63d Cong., 3d Sess., as follows:

"Section 14. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder."

Discussion in Congress further emphasized the purely proprietary sense in which this language was used. 51 Cong. Rec. 13630-13631.

The clause reappeared in the Bill which became the Federal Water Power Act and was there enacted into the law in its present form. The use, in § 27 of the Federal Power Act, of language having a limited meaning in relation to proprietary rights under the reclamation law and in public land bills, carries that established meaning of the language into the Federal Power Act in the absence of anything in the Act calling for a different interpretation of the language.

[21] See note 6.

[22] See note 15.

of Iowa, would enable Chapter 363 of the Code of Iowa, 1939, to remain in effect although in conflict with the requirements of the Federal Power Act. There is nothing in the express language of § 9(b) that requires such a conclusion.

It does not itself require compliance with any state laws. Its reference to state laws is by way of suggestion to the Federal Power Commission of subjects as to which the Commission may wish some proof submitted to it of the applicant's progress. The evidence required is described merely as that which shall be "satisfactory" to the Commission. The need for compliance with applicable state laws, if any, arises not from this federal statute but from the effectiveness of the state statutes themselves.

When this application has been remanded to the Commission, that Commission will not act as a substitute for the local authorities having jurisdiction over such questions as the sufficiency of the legal title of the applicant to its riparian rights, or as to the validity of its local franchises, if any, relating to proposed intrastate public utility service. Section 9(b) says that the Commission may wish to have "satisfactory evidence" of the progress made by the applicant toward meeting local requirements but it does not say that the Commission is to assume responsibility for the legal sufficiency of the steps taken. The references made in § 9(b) to beds and banks of streams, to proprietary rights to divert or use water, or to legal rights to engage locally in the business of developing, transmitting and distributing power neither add anything to nor detract anything from the force of the local laws, if any, on those subjects. In so far as those laws have not been superseded by the Federal Power Act, they remain as applicable and effective as they were before its passage. The State of Iowa, however, has sought to sustain the applicability and validity of Chapter 363 of the Code of Iowa in this connection, on the ground that the Federal Power Act, by the implications of § 9(b), has recognized this chapter of Iowa law as part of a system of dual control of power project permits, cumbersome and complicated though it be. If it had been the wish of Congress to make the applicant obtain consent of state, as well as federal authorities, to each project, the simple thing would have been to so provide. In the course of the long debate on the legislation it was proposed at one time to provide for some such a consent in § 9(b).

For example, in the Shields Bill, S. No. 1419, 65th Cong., 2d Sess., in 1917, a proviso was proposed:

> "That before the permit shall be granted under this Act, the permittee must first obtain, in such manner as may be required by the laws of the States, *the consent of the State or States* in which the dam or other structure for the development of the water power is proposed to be constructed." (Italics supplied.)

This proviso was not enacted into law but it illustrates the concreteness with which the proposal was before Congress. In 1918, when Representative Mondell, of Wyoming, successfully defended the present language against amendment, he stated the purposes of § 9(b) as follows:

> "There are two controlling reasons for the insertion of this paragraph. The first, from the standpoint of water-power legislation, is that *the water power commission shall have the benefit of all of the information* which the States possess relative to the condition of water supply at the point of proposed diversion. That is a very important reason for a provision of this kind. . . . The second reason is so that the bill shall carry with it *notice to the commission that they must proceed in accordance with the State laws, which they must do in any event, whether the provision were in the bill or not.*" 56 Cong. Rec. 9813-9814. (Italics supplied.)

The purpose of this section as thus explained is consistent with the contention of the Commission in this case. It provides for presentation of information to the federal commission and protects the constitutional rights of the States. This explanation does not support the contention of the State of Iowa that § 9(b) amounts to the subjection of the federal license to requirements of the state law on the same subject. The inappropriateness of such an interpretation is apparent in the light of the circumstances which culminated in the passage of the Federal Water Power Act in 1920. The purposes of the Act were then so generally known as to have made such a restrictive interpretation impossible and a denial of it unnecessary. It was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.

It was a major undertaking involving a major change of national policy.[23] That it was the intention of Congress to secure

[23] The nation-wide drive for the passage of this legislation dates back at least to the administration of Theodore Roosevelt and to the enthusiastic

a comprehensive development of national resources and not merely to prevent obstructions to navigation is apparent from the provisions of the Act, the statutory scheme of which has been several times reviewed and approved by the courts.[24]

The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls.[25] The contention of the State of Iowa is comparable to that which was presented on behalf of 41 States and rejected by this Court in *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 404-405, 426-427, where this Court said:

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support of "the conservationists" led by Gifford Pinchot, as Chief of the Division of Forestry.

"With all its faults the Federal Water Power Act of 1920 marked a great advance. It established firmly the principle of federal regulation of water power projects, limited licenses to not more than fifty years, and provided for Government recapture of the power at the end of the franchise.

"For the first time, the Act of 1920 established a national policy in the use and development of water power on public lands and navigable streams. . . . ." Pinchot, The Long Struggle for Effective Federal Water Power Legislation (1945), 14 Geo. Wash. L. Rev. 9, 19. See also, Kerwin, Federal Water Power Legislation, c. VI.

The present Act was distinctly an effort to provide federal control over and give federal encouragement to water power development. It grew out of a bill prepared by the Secretaries of War, Interior and Agriculture. It was recommended by a Special Committee on Water Power created in the House of Representatives at the suggestion of President Wilson. See Statement by Representative Sims, Chairman of the Committee on Water Power, 56 Cong. Rec. 9797-9798. The bill was to provide "a method by which the water powers of the country, wherever located, can be developed by public or private agencies under conditions which will give the necessary security to the capital invested and at the same time protect and preserve every legitimate public interest. . . . The problems are national, rather than local; they transcend state lines and cannot be handled adequately except by or in conjunction with national agencies." Statement by David F. Houston, Secretary of Agriculture, quoted in H. R. Rep. No. 61, 66th Cong., 1st Sess., p. 5.

[24] New Jersey v. Sargent, 269 U. S. 328; United States v. Appalachian Electric Power Co., 311 U. S. 377; Clarion River Power Co. v. Smith, 59 F. 2d 861, certiorari denied, 287 U. S. 639; Alabama Power Co. v. McNinch, 94 F. 2d 601; Pennsylvania Water & Power Co. v. Federal Power Commission, 123 F. 2d 155, certiorari denied, 315 U. S. 806; Alabama Power Co. v. Federal Power Commission, 128 F. 2d 280, certiorari denied, 317 U. S. 652; Puget Sound Power & Light Co. v. Federal Power Commission, 137 F. 2d 701; Wisconsin Public Service Corp. v. Federal Power Commission, 147 F. 2d 743, certiorari denied, 325 U. S. 880; Georgia Power Co. v. Federal Power Commission, 152 F. 2d 908.

[25] Sections 4(e) and 10(a), comprehensive plans required; §§ 4(f) and 5, preliminary permits; § 4(g), investigation of power resources; § 6, license term of 50 years; § 7(a) development of water resources on a national basis; § 7(b), developments by the United States itself; § 13, prompt construction required; § 14, recapture of projects and payment for them by the Government upon expiration of licenses, thus giving the Government a direct interest in and reason for control of every feature of each licensed project; § 21, federal powers of condemnation vested in licensee; and § 28, prohibition of amendment or repeal of licenses.

"The states possess control of the waters within their borders, 'subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers.' It is this subordinate local control that, even as to navigable rivers, creates between the respective governments a contrariety of interests relating to the regulation and protection of waters through licenses, the operation of structures and the acquisition of projects at the end of the license term. But there is no doubt that the United States possesses the power to control the erection of structures in navigable waters.

"The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government. The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. Even if there were no such relationship the plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. It may likewise grant the privilege on terms. It is no objection to the terms and to the exertion of the power that 'its exercise is attended by the same incidents which attend the exercise of the police power of the states.' The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment."

It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon these issues on behalf of the people of Iowa as well as on behalf of all others.

We accordingly reverse the judgment of the court below with directions to remand the case to the Federal Power Commission for further proceedings in conformity with this opinion.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice FRANKFURTER dissenting.

This case does not present one of those large constitutional issues which, because they are so largely abstract, have throughout its history so often divided the Court. The controversy, as I understand it, is concerned with the proper administration of a law in which Congress has recognized the interests of the States as well as of the United States and has entrusted the proper adjust-

ment of these nation-State relations to the interrelated functions of the Federal Power Commission and the courts.

We are all agreed that Congress has the constitutional power to promote a comprehensive development of the nation's water resources and that it has exercised its authority by the Federal Power Act. 41 Stat. 1063, 49 Stat. 838; 16 U. S. C. §§ 791(a) *et seq.* See *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *New Jersey* v. *Sargent*, 269 U. S. 328; *United States* v. *Appalachian Power Co.*, 311 U. S. 377. And in view of Congress' power, of course, this enactment overrides all State legislation in conflict with it. But the national policy for water power development formulated by the Federal Power Act explicitly recognizes regard for certain interests of the States as part of that national policy. This does not imply that general, uncritical notions about so-called "States' rights" are to be read into what Congress has written. It does mean that we must adhere to the express Congressional mandate that the public interest which underlies the Federal Power Act involves the protection of particular matters of intimate concern to the people of the States in which proposed projects requiring the sanction of the Federal Power Commission are to be located. By § 9(b) of the Act, 41 Stat. 1063, 1068; 16 U. S. C. § 802(b),[1] Congress explicitly required that before the Commission can issue a license for the construction of a hydro-electric development, such as the proposed project of the petitioner, the Commission must have "satisfactory evidence that the applicant has complied with the requirements of the laws of the State" in reference to the matters enumerated.

Whether the Commission has such "satisfactory evidence" necessarily depends upon what the requirements of State law are. In turn, what the requirements of State law are often depends upon the appropriate but unsettled construction of State law. And so, the Commission may well be confronted, as it was in this case, with the necessity of determining what the State law requires before it can determine whether the applicant has satisfied it, and, therefore, whether the condition for exercising the Commission's power has been fulfilled.

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[1] "Sec. 9. That each applicant for a license hereunder shall submit to the commission . . .

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act."

To safeguard the interests of the States thus protected by § 9(b), Congress has directed that notice be given to the State when an application has been filed for a license, the granting of which may especially affect a State. § 4(f), 49 Stat. 838, 841; 16 U. S. C. § 797(f). If a State does not challenge the claim of an applicant, the evidence submitted by the applicant, if found to be satisfactory by the Commission, has met the demands of § 9(b), and a State cannot thereafter challenge the Commission's determination. But a real problem in administration is presented to the Power Commission when a State does intervene and claims that the applicant has not complied with its lawful requirements. For, before the Commission can meet the duty placed on it by § 9(b), it must ascertain the scope and meaning of the State laws. Suppose the State law is not clear or is susceptible of different constructions and has received no construction by the only authoritative source for the interpretation of State laws, namely, the highest court of the State. Must the Federal Power Commission give an independent interpretation of the laws of the State? This is not to suggest an unreal or hypothetical situation. The Federal Power Commission submitted here a compilation of laws relating to State requirements relevant under § 9(b) for not less than thirty States. Are the lawyers of the Commission to make themselves the originating interpreters of the laws of these States? Are they to construe, for instance, the laws of New Jersey and Oklahoma and Arizona and Illinois when the courts of those States have not spoken? And if they do and the State appeals from the decision, must the Court of Appeals for the District of Columbia become the interpreter of these various laws? Finally, in the event of a further appellate review is this Court to construe State legislation without guidance by the State courts? Time out of mind, and in a variety of situations, this Court has admonished against the avoidable assumption by this Court of the independent construction of State legislation. See, *e. g.*, *Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 207-209; Brandeis, J., dissenting, in *R. R. Comm'n* v. *Los Angeles R. Co.*, 280 U. S. 145, 158, 164-66. It is pertinent to recall the classic statement of the reason for leaving to the controlling interpretation of local courts the meaning of local law: "to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books." *Diaz* v. *Gonzalez*, 261 U. S. 102, 106. If it has been deemed unwise to throw upon this Court

the burden of construing local legislation when the construction could by appropriate procedure be had from the States, it seems odd that we should reject this as a rule of administration adopted by the Power Commission.

That is all that the Commission has done in this case. It has said, in effect: "We do not know what the Iowa law demands of the applicant. Iowa has a right to make certain demands under § 9(b) and until they are met we are not empowered to grant a license to the applicant. But we cannot tell whether they have been met, because the meaning of the Iowa statutes has not been determined, as it easily can be determined, by an appropriate action in the Iowa courts. Only after such an authoritative pronouncement can we know what our obligation under the statute may be." The Court of Appeals for the District of Columbia thought that such procedure made sense. It seems to have said: "The Commission doesn't know what the Iowa law requires, and neither do we. For we cannot tell what it requires until the Iowa Supreme Court tells us what it requires. And an adjudication of that issue can be readily secured if the applicant will proceed along the easy path provided by Iowa for obtaining such an adjudication." 151 F. 2d 20. See Iowa Laws, 1943, c. 278, § 306 and *Lloyd* v. *Ramsay*, 192 Iowa 103, 116-17. Even we cannot construe the requirements of Iowa law in the absence of a determination by the Iowa Supreme Court. And in much more conventional types of litigation we have evolved the procedure whereby federal litigation is stayed until the State law is authoritatively determined by a State court. *E. g.*, *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496; *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101; *A. F. of L.* v. *Watson*, March 25, 1946.

What reason of policy is there for not approving this mode of adjusting interests that involve a regard for both federal and State enactments? The Federal Power Commission which devised this procedure has not been an unzealous guardian of the national interests. *E. g.*, *F. P. C.* v. *Natural Gas Pipeline Co.*, 315 U. S. 575; *F. P. C.* v. *Hope Natural Gas Co.*, 320 U. S. 591.

It is no answer to suggest that the Attorney-General of Iowa at the bar of this Court expressed a view of the Iowa statute which would make obedience to it needless because of conflict with the provisions of the Federal Power Act. The Attorney-General is not the judicial organ of the State of Iowa. This Court does not always take the interpretation by the Attorney-General of the United States of a federal statute. It should not take the view of the

Attorney-General of Iowa as authoritative on a statute not construed by the Supreme Court of Iowa when we are called upon to make the adjustment in federal-State relations which Congress has enjoined in § 9(b). After all, advocates, including advocates for States, are like managers of pugilistic and election contestants in that they have a propensity for claiming everything. Before conflict can be found between federal and State legislation, construction must be given the State legislation. Avoidance of conflict is itself an important factor relevant to construction. And so, construction of State legislation relating to the matters dealt with in the Federal Power Act is subtle business and a subtlety peculiarly within the duty, skill, and understanding of State judges.

If it be said that the procedure for which the Federal Power Commission contends may take time, there is no assurance that a contested case like this will not take just as much time. The Commission must pass independently on an unconstrued State statute; its construction may then come before the Court of Appeals for the District and eventually before this Court. Even then the possibility remains that this Court's decision will be followed by one in the State court ruling, as has not been unknown, that this Court's interpretation was in error. In any event, mere speed is not a test of justice. Deliberate speed is. Deliberate speed takes time. But it is time well spent.

With due respect, I have not been able to discover an adequate answer to the position of the Federal Power Commission, thus summarized in the Solicitor-General's brief:

> "Unless Section 9(b) is to be given no effect whatever, some evidence of compliance with at least some state laws is a prerequisite to the issuance of a federal license, and the view of the court below, that there is no occasion, in this case, to anticipate conflicts between state and federal authority and the consequent invalidity of the state law, is not an unreasonable one. 'To predetermine, ever in the limited field of water power, the rights of different sovereignties, pregnant with future controversies, is beyond the judicial function.' *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 423. Here petitioner, since the modification of its plans, has given the State Executive Council and the Iowa courts no opportunity to express their views on its proposed project with reference to matters which may be peculiarly of local concern; without such an expression, it is difficult to assess the propriety of what is only an anticipated exercise of the State's power."

Accordingly, I think that the judgment should be affirmed.